IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

WEDNESDAY, THE 4TH JULY 2007 / 13TH ASHADHA 1929

WP(C).No. 33396 of 2004(A)

OS.36/2001 of MUNSIFF COURT, ETTUMANOOR
.....

PETITIONER:

K.K.VERKEY, KAITHACKAL HOUSE,
OMALLOOR KARA, KOTHANALLOOR VILLAGE,
VAIKOM TALUK.

BY ADV. SRI.SANTHEEP ANKARATH
SRI.ROY GEORGE

RESPONDENTS:
----

1. **MATHEW PAUL, KALLADAYIL HOUSE,**
   OMALLOOR KARA, KOTHANALLOOR VILLAGE,
   VAIKOM TALUK.

2. **LILLY CIRIAC, W/O.MATHEW PAUL,**
   DO. DO.

BY ADV. SRI.JAISON PALIYIL for R1
SRI.PRASUN.S

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 04/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC.NO.33306/2004 A

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: **COPY OF THE PLAINT IN O.S.NO.36 OF 2001 OF ETTUMANOOR MUNSIFF'SCOURT DTD. 09/02/01.**

EXT.P2: **COPY OF THE WRITTEN STATEMENT BY THE RESPONDENTS DTD. 16/02/2001.**

EXT.P3: **COPY OF THE I.A.NO.1403 OF 2004 IN OS.36 OF 2001 DTD. 19/10/2004.**

EXT.P4: **COUNTER FILED BY THE RESPONDENTS DTD. 26/10/2004.**

EXT.P5: **COPY OF THE ORDER PASSED BY THE MUNSIFF COURT, ETTUMANOOR, IN INTERLOCUTORY APPLICATION 1403 OF 2004 IN O.S.36 OF 2001, DTD. 28/10/2004.**

/TRUE COPY/

KSS

PIUS C. KURIAKOSE, J.

W.P.(C) NO. 33396 of 2004

Dated this the 4th day of July , 2007

JUDGMENT

A request for adjournment is made on behalf of the learned counsel for the respondents. But I am sure that in this case where the supervisory jurisdiction of this court under Article 227 is invoked on the reason that the impugned order is vitiated by jurisdictional error in the sense that there has been failure on the part of the learned Munsiff to exercise a jurisdiction vested in her, I am inclined to grant the above application. Under the impugned order (Ext.P5), the learned Munsiff has dismissed the application for amendment of the plaint. The suit was for a declaration of easement rights over a pathway and for consequential injunction. The suit was listed for trial and the plaintiff's evidence was closed. It was at that juncture Ext.P3 application for amendment was filed.

2. I have gone through Ext.P3 amendment application as well as an affidavit in support of the same. Sri.Santheep Ankarath, the learned counsel for the petitioner submits that the

subject matter of the suit will not change on account of granting of the amendment application. turn By virtue of the amendment, the subject matter only will become more precise and the amendment is necessary for enabling the court below to pass an effective decree if the court becomes inclined to pass a positive decree in favour of the petitioner. Of course there was a delay and application has been filed only after the commencement of the trial. Provisio to Rule 17 of Order 6 provides that even in a case where amendment is sought for after commencement of the trial, if the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial, the court will be justified in granting the amendment .

2. On reading through the affidavit, I find that it has been claimed by the petitioner that in spite of exercise of due diligence he was unable to seek the amendment earlier. I do not find any reason to turn down that claim. Amendment application should have been allowed by the learned Munsiff of course after imposing suitable terms on the petitioner.

3. Accordingly, I set aside Ext.P5 and order that I.A.

No.1403/2004 will stand allowed subject to the following conditions:

The petitioner shall pay a total amount of Rs.2,000/- (Rs.Two Thousand) by way of cost, out of which, Rs.1,500/- (Rs.One Thousand Five Hundred) will be payable to the respondents either directly or through their counsel before this court and Rs.500/- (Rs.Five Hundred) will be payable to the High Court Legal service Committee. Payment as directed above shall be made within one month from today. If payments are not made, the impugned order will stand confirmed and the writ petition will stand dismissed. Once payment is made and the order setting aside the impugned order becomes operative, the court will permit the respondents to file additional written statement and if such statement is filed and additional contentions are raised , the court will formulate additional issues and will continue with the trial of the suit in accordance with law.

PIUS C. KURIAKOSE,

JUDGE.

dpk